

No. 85658-3

Court of Appeals No. 63299-0-I

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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ELSA ROBB, Personal Representative of the  
ESTATE OF MICHAEL W. ROBB,

Respondent,

vs.

CITY OF SEATTLE, a municipal corporation;  
OFFICER KEVIN McDANIEL; and OFFICER PONHA LIM,

Petitioners.

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**BRIEF OF AMICUS CURIAE, ASSOCIATION OF WASHINGTON  
CITIES IN SUPPORT OF PETITIONERS' MOTION FOR  
DISCRETIONARY REVIEW**

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Association of Washington Cities is a non-profit, non-partisan association of small and medium size cities and towns located throughout the State of Washington. The Association focuses on legislative representation, educational training, publications, technical assistance and member programs including municipal liability and property insurance, and training.

The Association of Washington Cities is concerned with advising and defending its members regarding municipal liability and advising its members regarding potential liability of municipal employees during their employment with the municipality and especially, law enforcement officials.

## **II. ARGUMENT**

This Court should accept discretionary review pursuant to RAP 13.4 as the Court of Appeals departs from generally accepted Washington law relating to the public duty doctrine.

Washington has consistently held that the first question when a lawsuit is brought for negligence against a municipality or municipal employee is:

**The threshold determination in a negligence action is whether a duty of care is owed by the defendant to the plaintiff. Whether the defendant is a governmental**

**entity or a private person, to be actionable, the duty must one owed to the injured plaintiff, and not to the public in general. This basic principle of negligence law is expressed in the public duty doctrine. Taylor v. Stevens County, 111 Wn.2d 159, 163 (1988), citations omitted.**

The court in Taylor held “no liability may be imposed for a public official’s negligent conduct unless it is shown that ‘the duty breached was owed to the injured person as an individual and not merely the breach of an obligation owed to the public in general.’ (i.e., a duty to all is a duty to none.)” Taylor, 111 Wn.2d at 163, citing J & B Dev. Co. v. King County, 100 Wn.2d 299, 303 (1987). The Association of Washington Cities and its members have relied upon these definitions of duties in regards to training its employees and members.

The decision by the Court of Appeals does not address this critical question of duty. Specifically, law enforcement officials, owe a general duty to the public at large to conduct police activities, in their respective jurisdiction. However, law enforcement officials have not been subject to a negligence lawsuit based upon this general duty. The Court of Appeals essentially makes law enforcement officials insurers of the public safety. The Court of Appeals held “a jury could find that the affirmative acts of the officer in connection with the Berhe stop created the risk of Berhe coming back for the shells and using them intentionally to harm someone,

or that a risk that was recognizable and extremely high. (Robb Opinion, page 15.)

The Court of Appeals improperly defined the actions by Officers McDaniel and Lim as creating a duty to protect Michael Robb. The Court of Appeals extension of this specific duty to Mr. Robb does not comply with Washington's recognized exceptions to the public duty doctrine.

Washington recognizes four exceptions to the public duty doctrine:

1. **Legislative intent.**
2. **Special relationship.**
3. **Voluntary rescue.**
4. **Failure to rescue.**

Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 786 (2001).

"If one of the exceptions applies, the government will be held as a matter of law to owe a duty to the individual Plaintiff or to a limited class of plaintiffs." Cummins v. Lewis County, 156 Wn.2d 844, 853 (2006), citing Bailey v. Town of Forks, 108 Wn.2d 262, 268 (1987).

In Cummins, this Court required a plaintiff to establish an exception to the public duty doctrine in order to proceed with a lawsuit against a municipal employee or municipality. It is undisputed that Mr. Robb cannot establish an exception to the public duty doctrine and he has not attempted to do so below.

Mr. Robb attempts to utilize the Restatement (Second) of Torts

§ 302B to establish a duty. Amicus curiae agree with Petitioners City of Seattle and Officers McDaniel and Lim that this section does not create a duty of care without complying with the public duty doctrine's requirements. The Court of Appeal's acceptance of the Restatement § 302 as establishing a duty of care in this case contravenes all previous Washington law recognizing a duty of care only when owed to a specific individual.

The Court of Appeals' reasoning would allow any individual harmed by Mr. Berhe to claim damages against the Petitioners in this matter. There is no explanation by the Court of Appeals as to why a specific duty of care was owed only to Mr. Robb in this matter, but for the fact that he was the subject of an intentional act by Mr. Berhe. The Court of Appeals' analysis leaves open the class of individuals to whom this new potential duty of care may be owed. In fact, the Court of Appeals' decision does not limit the scope of this duty to any identifiable individual and allows a duty of care to be applied for the public at large.

The Court of Appeals' analysis directly contravenes all Washington law regarding the public duty doctrine, which requires a plaintiff to establish that a duty is owed to the individual plaintiff. The Court of Appeals, by accepting § 302(b) as establishing a duty of care is recognizing and requiring that law enforcement officials become insurers

of public safety. The expansion of a law enforcement officer's duty under the Court of Appeals' analysis is quite expensive. Law enforcement officials will be required to protect the public at large from intentional acts of criminals. As in this case, there was no special relationship between Mr. Robb and Mr. Berhe that would notify law enforcement officers of the potential threat. The public duty doctrine was established to prevent this type of application of tort law as it relates to municipal entities and officers.

Amicus curiae is involved with in advising, training and insuring local municipalities throughout the State of Washington. The Court of Appeals' decision directly conflicts with established Washington law regarding actionable duties of care owed by municipalities and their employees. This Court should accept review of this case and reverse the Court of Appeals' decision expanding the duty of care beyond the bounds of the public duty doctrine. Amicus curiae attempts to advise and assist smaller municipalities avoiding liabilities and assist municipalities in the training of its employees. The Court of Appeals has departed from accepted Washington law and does not place a limit on municipal liability, especially when relating to law enforcement activities.

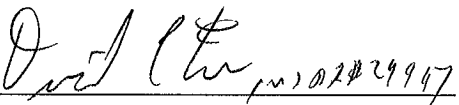
### **III. CONCLUSION**

This Court should accept review and reverse the Court of Appeals'



decision as it greatly expands the duty of care owed by municipalities and it departs from generally accepted Washington law. Moreover, under the Court of Appeals' reasoning, municipalities will be liable for most if not all instances where a third party intentionally harms an innocent individual. The shifting of liability from an at fault third party to a municipality or municipal employee is inappropriate under the public duty doctrine. This Court should reaffirm its prior rulings that a recognized exception to the public duty doctrine must exist in order to establish a duty of care owed by a municipality or municipal employees. This would create consistency and provide municipal employees and municipalities with specific duties of care that are required within their jurisdictions.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of April, 2011.

  
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of Washington Cities